Supreme Court, U.S.
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NO. _____

In The
Supreme Court of the United States

Thomas R. Hutchinson, Dennis P. Bullard, Robert J. Bullard, Barbara L. Lawrenz, Ruth Ann Libby, Kathryn M. Robinson, John M. Spanton, and Joan A. Godlove,
Petitioners,

v.

Richard Brady Pfeil, Mary Joan Pfeil, Lewis N. Carter, Doerner, Stuart, Saunders, Daniel & Anderson, L.L.P., Scott E. Hershman, and Barrett W. Freedlander, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the RICO statute applies to lawyers alleged to have engaged in fraudulent conduct in civil litigation that obstructs or impedes "the due administration of justice."

2. Whether on review of a Rule 12(b)(6) motion, a court can consider a defendant's factual arguments.

PARTIES TO THE PROCEEDING

Petitioners:

Dennis P. Bullard
Robert J. Bullard
Joan Godlove
Thomas R. Hutchinson
Barbara L. Lawrenz
Ruth Ann Libby
Kathryn M. Robinson
John M. Spanton

Respondents:

Bamberger, Foreman, Oswald and Hahn, L.L.P.
Barry Boxer
Lewis N. Carter
Doerner Saunders, Daniel & Anderson, an Oklahoma Partnership
Doerner Stuart, Saunders, Daniel, Anderson and Biolchini, an Oklahoma partnership
Barrett W. Freedlander
Hirschl & Adler Galleries, Inc.
George M. Hoffman, Individually and as a Member of the Neal Gerber & Eisenberg Firm
Bonnie J. Hahn
Scott E. Hershman
John David Hoover
Raymond J. Horowitz
David P. Kasper
Locke Reynolds LLP

Parties to the Proceeding (continued)

Locke Reynolds Boyd & Weisell
Neal Gerber & Eisenberg, an Illinois Partnership
Mary Joan Pfeil
Richard Brady Pfeil
Phillipe M. Salomon
Harry D. Shapiro
Spanierman Gallery
Ira Spanierman

Petitioners all were Appellants and Respondents all were Appellees to the appeal in the U.S. Court of Appeals for the Tenth Circuit.

Petitioners all were Plaintiffs and Respondents all were Defendants to one or more of the cases in the U.S. District Court for the Northern District of Oklahoma.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Thomas R. Hutchinson, Dennis P. Bullard, Robert J. Bullard, Barbara L. Lawrenz, Ruth Ann Libby, Kathryn M. Robinson, John M. Spanton, and Joan Godlove, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion issued by the United States Court of Appeals for the Tenth Circuit is unreported and is reproduced in the Appendix at 1. *See Hutchinson v. Pfeil*, Slip op. nos. 06-5053, 06-5055, 06-5121, 06-5122, 2007 WL 521241 (10th Cir. February 21, 2007). The orders and opinions from the Northern District of Oklahoma, which formed the basis for the consolidated appeal, are also unreported, and are found at Appendix 2 (Case No. 04-C-341-E, Order of January 24, 2006); Appendix 3 (Case No. 02-C-721-E, Order of January 24, 2006); Appendix 4 (Case No. 02-C-425-E, Order of March 6, 2003); and Appendix 5 (Case No. 02-C-408-E, Oder of March 6, 2003).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment on February 21, 2007. The Court has jurisdiction to review this petition pursuant to 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED

This appeal involves the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, and Rule 12(b)(6) of the Federal Rules of Civil Procedure. The full text of applicable parts of that statute and rule are reproduced in Appendix 6 and 7.

STATEMENT OF THE CASE

This case concerns the parameters for proper review of Rule 12(b)(6) motions to dismiss.

The Petitioners, except plaintiffs' counsel,[1] are descendants of the heirs of American Impressionist artist Theodore Robinson [1852 to 1896].

What the Tenth Circuit referred to as "the legal battle" concerning the ownership of paintings by Theodore

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[1] Plaintiffs' counsel, Joan Godlove, was a named Plaintiff in Case No. 02-C-425-E. The other Petitioners, as descendants of the artist's heirs, are referred to collectively as "the Robinson plaintiffs," where appropriate.

Robinson begin in 1980, when Hutchinson's father filed an action for judicial partition of a collection of Robinson paintings that had been in the family's possession since the artist's death. In 1990, Hutchinson filed an independent action to vacate the judgment in the 1980 case for fraud on the court. He also filed fraud and other claims against Ira Spanierman, a defendant in the partition action, and the lawyer who represented his father in that action. Between 1992 and 1996, the Robinson plaintiffs asserted claims for replevin or partition of other paintings when information about their provenance came to light. Summary judgments were entered against the Robinson plaintiffs in each of these actions and subsequently affirmed on appeal.

In the present case, the Petitioners brought four separate actions in federal court against numerous defendants, including art dealers and lawyers, asserting numerous causes of action including fraud on the court, conversion and conspiracy, negligent supervision, attorney

deceit and collusion, and Civil RICO.[2] The RICO allegations against the lawyers included detailed allegations that in the prior civil litigation they had filed false documents in court, they had concealed material information, they had blocked testimony of critical witnesses who are now deceased, they had filed briefs that contained misrepresentations of fact and law, and they had engaged in other "litigation-related criminal activity" in furtherance of shared purposes of the RICO enterprises.[3] The complaints alleged that the fraudulent, litigation-related conduct of the lawyers constituted obstruction of justice under 18 U.S.C. § 1503.[4] Such conduct comes within § 1961(1)'s definition of "racketeering activity."

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[2] Not all the complaints asserted all of these causes of action. For example, Case No. 04-CV-341-E against lawyers Hahn and Kasper and their law firms alleged only violations of RICO and attorney deceit.

[3] The RICO enterprises, as defined by 18 U.S.C. §1961(4), were identified as both entities and associated-in-fact enterprises. *See, e.g.*, Amended Complaint (#9), at ¶¶ 11-43, at pp. 3-14, *Hutchison v. Hahn*, Case No. 04-CV-341-E (filed August 9, 2004).

[4] As will be argued, a lawyer's actions in civil litigation—including filing false documents and concealing evidence—is actionable as an obstruction of justice. *See United States v. Cueto*, 151 F.3d 620, 633 (7th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999).

Each of the complaints contains over 200 paragraphs of extraordinarily detailed factual allegations.

The Defendants filed Rule 12(b)(6) motions to dismiss in which they made numerous factual arguments concerning statutes of limitations, *res judicata* and other affirmative defenses. The District Court granted the Defendants' motions to dismiss holding that the gravamen of Plaintiffs' claims was "fraud on the court"—even for Case No. 04-CV-341E which did not allege "fraud on the court"—and that none of the complaints stated a claim upon which relief could be granted. *See* Appendix 2-5.

Petitioners appealed the four separate orders of dismissal to the Tenth Circuit which consolidated all four appeals "for procedural purposes only" and then summarily affirmed all four dismissals, without any discussion, other than to state that it found the arguments to be "without merit." *See* Appendix 1, at 8. The appellate court also found that "each of the four appeals are [sic]

frivolous" and awarded sanctions of double costs to the Defendants.[5]

REASONS THE PETITION SHOULD BE GRANTED

Although on first blush, this case may appear to concern only the parties, the case presents issues of great significance. In almost every case, a defendant files a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. And, with each motion, the district court must apply the proper standard of review. The appellate court, in reviewing Rule 12(b)(6) dismissals *de novo* is required to apply the same standard. When, as here, there appears confusion in the standard of review that affects almost all litigants, it is incumbent on the Court to resolve conflicts in the case law in order to provide guidance to courts and litigants.

The District Court and the Tenth Circuit diverged below from the majority of courts in other Circuits in two areas. ***First,*** the District Court and the Tenth Circuit held

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[5] Petitioners have not raised the issue of appellate sanctions in this petition because of the fact-based nature of that award. However, if this Court reverses the Tenth Circuit's Order and Judgment, Petitioners pray that the Court hold that the sanctions are moot.

that allegations that lawyers engaged in fraudulent conduct in civil litigation—made criminal as an obstruction of justice under 18 U.S.C. § 1503—failed to state claims upon which relief can be granted under RICO. ***Second***, the District Court and the Tenth Circuit held that federal courts could consider a defendant's factual arguments without converting the motion to dismiss into a motion for summary judgment. The Court should grant this petition to resolve these issues of great importance to the bench and bar and the administration of justice in federal courts.

I. This Court Should Grant Certiorari To Resolve A Conflict Over Whether The RICO Statute Applies To Attorneys Alleged To Have Engaged In Fraudulent Conduct In Civil Litigation That Impedes "The Due Administration of Justice."

As stated earlier, this consolidated appeal concerns orders of dismissal entered in four separate cases. Each of the four complaints that were dismissed asserted different claims. However, for purposes of this argument, Petitioners are only concerned with the dismissals of their civil RICO claims against the lawyers and law firms.

The review of a Rule 12(b)(6) dismissal is de novo. *See Yanaki v. Iomed, Inc.*, 415 F.3d 1204, 1207 (10th Cir. 2005), *cert. denied sub nom.*, 126 S.Ct. 1910 (2006). Under the proper standard of review, the District Court was required to construe the complaint in the light most favorable to the Plaintiffs and accept all of Plaintiffs' allegations as true. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* Thus, the question posed here is whether the District Court properly dismissed RICO claims which alleged that Petitioners had been injured in their property by the lawyers' fraudulent conduct in the earlier litigation which constituted obstruction of justice under 18 U.S.C. § 1503.

The RICO statute provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he

> sustains and the cost of the suit, including a reasonable attorneys' fee.

18 U.S.C. § 1964(c).

Plaintiffs brought their RICO actions pursuant to 18 U.S.C. § 1962(c), which prohibits racketeering and unlawful debt collection, and 18 U.S.C. § 1962(d), which prohibits conspiring to violate one of the other RICO sections. Thus, in order to plead a violation of § 1962(c), Plaintiffs were required to allege: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). "In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Id.* Plaintiffs alleged each of those elements.

In their motions to dismiss, the lawyers argued that they were "absolutely immune" from RICO liability for their litigation-related conduct, no matter how fraudulent

or unlawful that conduct was alleged to be.[6] That position was adopted by the District Court (and subsequently by the Tenth Circuit which adopted the reasoning of the district court) when the district court held in all four orders of dismissal that Plaintiffs' allegations could not form a basis for recovery against the lawyers under RICO.[7] The lawyers' position is wrong—lawyers are not immune from RICO liability. *See Morrow v. Blessing*, 2004 WL

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[6] *See, e.g., Hutchinson v. Pfeil*, Case No. 02-C-408-E, Hershman Brief (#31, at 5) ("a lawyer may not be sued for litigation related conduct"); Freedlander Brief (#33, at 7-8); *Hutchinson v. Pfeil*, Case No. 02-C-425-E, Shapiro Brief (#37, at 8-9); *Hutchinson v. Hahn*, Case No. 04-C-341, Kasper/Locke Reynolds Brief (#16, at 12-13, 15) (RICO claims "are barred by absolute immunity related to judicial proceedings").

[7] The District Court held that the "underpinning" of the RICO claim was "fraud on the court", which the court discounted as inapplicable when fraud "is in the framing of discovery responses and making arguments to the Court." *See, e.g.*, Case No. 04-C-341-E, Order of January 24, 2006, attached as Appendix 2.

2223311, *4 (E.D. Pa. 2004) ("Lawyers assuredly do not have immunity from RICO or the Lanham Act.").[8]

The decisions of the courts below stand in stark conflict with the decisions of courts in other Circuits that would permit a RICO lawsuit to go forward based on allegations of a lawyer's fraudulent conduct in civil litigation. *See, e.g., Handeen v. Lemaire*, 112 F.3d 1339, 1350-1351 (8th Cir. 1997); *The Cadle Co. v. Flanagan*, 2006 WL 860063, *9 (D. Conn. 2006); *State Farm Mut. Auto. Ins. Co. v. Makris*, 2003 WL 924615, *1 (E.D. Pa. 2003).

After this Court's decision in *Reves*, some believed that there could be no RICO liability against professionals, such as lawyers. *See Reves v. Ernst & Young*, 507 U.S. 170 (1993). However, courts and commentators were quick to point out that *Reves* does not immunize lawyers

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[8] In making their immunity arguments, the lawyers relied on defamation cases—which do protect lawyers from liability for comments made during litigation—and not RICO cases which recognize no such immunity for fraudulent conduct committed during civil litigation. *See Ball Corp. v. Xidex Corp.*, 967 F.2d 1440, 1444 (10th Cir. 1992) ("We concluded that Supreme Court precedent supports absolute immunity for private lawyers for defamation claims but that immunity cannot be extended to allegations of fraud.").

from RICO liability. *See Handeen v. LeMaire*, 112 F.3d 1339, 1349 (8th Cir.1997) ("Neither *Reves* nor RICO itself exempts professionals, as a class, from the law's proscriptions, and the fact that a defendant has the good fortune to possess the title "attorney at law" is, standing alone, completely irrelevant to the analysis dictated by the Supreme Court."); *Thomas v. Ross & Hardies*, 9 F.Supp.2d 547, 554 (D. Md. 1998)("Courts have recognized, however, that *Reves* did not establish a *per se* rule that one cannot operate or manage an enterprise via the provision of legal services."); Jeffrey N. Shapiro, *Attorney Liability Under RICO §1962(c) After Reves v. Ernst & Young*, 61 U. CHI. L. REV. 1153, 1153 (Summer 1994) ("Professional service providers such as accountants and attorneys are not immune from liability under the Racketeer Influenced and Corrupt Organizations Act ("RICO")").

While it is true that a lawyer is not subject to RICO liability merely for representing a client, or for "legitimate acts of attorneys on behalf of clients," *Morin v. Trupin*,

711 F.Supp. 97, 105-06 (S.D. N.Y.1989),[9] a lawyer is not free to engage "in fraudulent conduct in violation of RICO." *The Cadle Co. v. Flanagan*, 2006 WL 860063, *9 (D. Conn. 2006).

There is good reason why a lawyer is not immune from RICO liability for "litigation-related criminal activity." The lawyer is an officer of the court whose honest services are essential for the administration of justice. Although a lawyer is privileged to zealously represent his or her client in a civil case, that lawyer is not privileged to engage in fraudulent activity. *See Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1080 (2d Cir. 1977) ("Thus, while an attorney is privileged to give honest advice, even if it is erroneous, and generally is not responsible for the motives of his clients, admission to the bar does not create a license to act maliciously, fraudulently, or knowingly tread upon the legal rights of others."), *cert. denied*, 434 U.S. 1035 (1978).

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[9] A number of courts have held that legitimate acts of an attorney in litigation do not subject the lawyer to RICO liability. *See, e.g., D'Orange v. Feely*, 877 F.Supp. 152, 156 (S.D.N.Y.1995); *Paul S. Mullin & Associates v. Bassett*, 632 F.Supp. 532, 540 (D.Del.1986). However, the conduct alleged here is not legitimate.

It is for that reason that it is well settled that a lawyer is subject to criminal liability for obstruction of justice for engaging in any conduct in civil litigation—whether lawful or unlawful on its face—which has the "natural and probable effect" of interfering with the due administration of justice. *See United States v. Aguilar,* 515 U.S. 593, 598 (1995). For example, lawyers have been convicted of violating 18 U.S.C. § 1503 or its predecessor for engaging in the following "corrupt" conduct in civil litigation:

- filing false pleadings in a civil proceeding in an attempt to corrupt the due administration of justice. *United States v. Cueto*, 151 F.3d 620, 633 (7th Cir. 1998);
- willful concealment and destruction of documents in a civil case. *United States v. Lundwall*, 1 F.Supp.2d 249, 253 (S.D.N.Y.1998);
- misrepresentations in pleadings and pretrial submissions; concocting fabricated testimony in civil proceeding. *United States v. Eisen*, 974 F.2d 246, 253 (2d Cir. 1992);

- providing false evidence at a civil trial—court held that was mail fraud. *United States v. Rodolitz,* 786 F.2d 77 (2d Cir.), *cert. denied,* 479 U.S. 826 (1986);
- lawyer's presentation of fraudulent civil judgment to his client after resolution of lawsuit. *United States v. London,* 714 F.2d 1558 (11th Cir.1983);
- concealing witnesses in a civil suit. *See Wilder v. United States,* 143 F. 443, 443 (4th Cir. 1906), *cert. denied,* 204 U.S. 647 (1907).

Courts have long rejected the notion—advanced by the defendants and accepted by the courts below—that lawyers are not subject to criminal liability for their conduct in civil litigation. *See Wilder v. United States,* 143 F. at 440. Any other position would provide lawyers with *carte blanche* to corrupt the civil justice system. As the Seventh Circuit explained: "We refuse to accept the notion that lawyers may do anything, including violating the law, to zealously advocate their client's interests and then avoid

criminal prosecution by claiming that they were 'just doing their job.'" *United States v. Cueto*, 151 F.3d at 634-35. That sentiment was echoed by the First Circuit:

> For the foregoing reasons, we emphatically reject the notion that a law degree, like some sorcerer's amulet, can ward off the rigors of the criminal law. No spells of this sort are cast by the acceptance of a defendant's retainer. We decline to chip some sort of special exception for lawyers into the brickwork of §1503. By our reckoning, attorneys cannot be relieved of obligations of lawfulness imposed on the citizenry at large. Acceptable notions of evenhanded justice require that statutes like § 1503 apply to all persons, without preferment or favor. As sworn officers of the court, lawyers should not seek to avail themselves of relaxed rules of conduct.

See United States v. Cintolo, 818 F.2d 980, 996 (1st Cir., *cert. denied,* 484 U.S. 913 (1987).

In another obstruction of justice case based on the lawyer's conduct in civil litigation, the Second Circuit reinforced the notion that lawyers are not free to engage in fraudulent activities in civil litigation:

> Litigants depend on the integrity of the conduct of participants in civil proceedings though disputing the validity of their opponents' claims to impose or resist civil liability. It is one thing to challenge the perception, memory, or bias of an opponent's witnesses; it is quite another for a party's lawyer and a witness to concoct testimony that they know has been wholly fabricated.

United States v. Eisen, 974 F.2d at 253.

The principles expressed in cases where lawyers were indicted for obstruction of justice apply equally to cases asserting civil RICO claims against lawyers. There is no sound reason to allow attorneys to escape RICO liability when they have engaged in the type of conduct alleged here, in not one, but in **six different federal courts**—false documents, deliberately concealing material evidence, filing briefs that contained false representations of fact and law, and so forth--as part of fraudulent schemes of the associated-in-fact RICO enterprise to defeat the Robinson plaintiffs' vested interests, as descendants of the artist's heirs, in certain paintings by American Impressionist Theodore Robinson. Such RICO

claims have been expressly allowed by other courts. *See, e.g.*, *Handeen v. Lemaire*, 112 F.3d 1339, 1350-1351 (8th Cir. 1997) (law firm's participation in fraudulent Rule 13 bankruptcy "could justify a finding that the Firm participated in the conduct of the alleged RICO enterprise."); *The Cadle Co. v. Flanagan*, 2006 WL 860063, *9 (D. Conn. 2006)("knowingly filing false documents with the court" in a civil proceeding constituted "participation in fraudulent conduct in violation of RICO."); *State Farm Mut. Auto. Ins. Co. v. Makris*, 2003 WL 924615, *1 (E.D. Pa. 2003)(denying 12(b)(6) motion to dismiss RICO claim based on fraudulent litigation-related conduct of attorneys).

As set forth earlier, the district court was bound by the strict standard of review on Rule 12(b)(6) motions to accept all allegations in the complaint as true. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Those allegations were sufficient to state RICO claims against the lawyer-defendants. The District Court and the Tenth Circuit erred when they refused to consider the lawyers' liability under RICO, in contrast to holdings of courts in other Circuits.

This Court should take this unique opportunity to resolve this conflict and clarify the parameters of attorney liability under RICO for conduct in civil litigation. The petition for writ of certiorari should be granted.

II. This Court Should Grant Certiorari To Resolve A Conflict On Whether On Review Of A Rule 12(b)(6) Motion, A Court Can Consider A Defendant's Factual Arguments.

A second reason the Court should grant review is to clarify the standard of review of Rule 12(b)(6) motions so that there will be "clearly established Federal law" on the procedural issue that Petitioners raise. *See Williams v. Taylor,* 529 U.S. 362, 412 (2000). This would provide needed guidance to every court and virtually every litigant.

It is apparent from a review of the District Court's dismissal orders that it relied upon factual assertions the defendants made in their motions to dismiss, but failed to convert their Rule 12(b)(6) motions to dismiss into motions for summary judgment. On separate appeals from each of the four orders of dismissal, Petitioners complained that the District Court erred when it based its rulings on matters outside the complaints, specifically the

factual arguments in defendants' motion papers, without first treating the defendants' Rule 12(b)(6) motions to dismiss as motions for summary judgment. The Tenth Circuit acknowledged those arguments, but then held, without discussion, that "plaintiffs' arguments of error, in each of the four appeals, are without merit." *See* Appendix 1.

The last sentence of Rule 12(b) provides:

> If, on motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion **shall** be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties **shall** be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

See FED. R. CIV. P. 12(b) (emphasis added).

The word "shall" used in the Rule is mandatory. *See* Charles A. Wright & Arthur R. Miller, FEDERAL

PRACTICE & PROCEDURE § 1366 (2007 update)[10] (hereafter "Wright & Miller"). Moreover, the quoted provision of Rule 12(b)(6) "is in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). Unlike the Tenth Circuit, other Circuits "strictly enforce" the Rule's so-called "conversion" requirements. *See Eubank v. Leslie*, 210 Fed.Appx. 837, 845-846, 2006 WL 3627005, at *7 (11th Cir. 2006); *Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000) ("This conversion requirement is strictly enforced whenever there is a 'legitimate possibility' that the district court relied on material outside the complaint in ruling on the motion.").

The purpose of this rule is to restrict review of motions to dismiss for failure to state a claim to the sufficiency of the pleading, rather than to a review of the merits. *See* Wright & Miller, at § 1366; *Gibb v. Scott*, 958

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[10] Version referenced is available on Westlaw.

F.2d 814, 816 (8th Cir.1992) ("a 12(b)(6) motion will succeed or fail based upon the allegations contained in the face of the complaint."). It is reversible error for a court to consider "matters outside the pleading" in granting a motion to dismiss without converting the motion into a motion for summary judgment, since the motion to dismiss "can be based only on the pleading." *See* Wright & Miller, at § 1366.[11]

In this case, the Defendants' motions to dismiss raised affirmative defenses, such as the statute of limitations and *res judicata,* and contained a number of factual assertions. Even a cursory review of the dismissal orders reveals that the District Court credited these "outside the pleading [ ]" matters without converting the motions to dismiss to motions for summary judgment. For example, the District Court specifically refers to "the same arguments" being made as in prior cases, to its

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[11] There are certain recognized exceptions to that rule that do not apply here. For example, on review of a Rule 12(b)(6) motion to dismiss, the district court can consider: (1) briefs and oral argument; (2) exhibits attached to the pleadings; (3) matters on which the court can take judicial notice; and (4) items of "unquestioned authenticity" that are "central" to the claim. *See* Wright & Miller, at § 1366 (citing cases).

consideration of the law and factual record of the "1992 case," to the defense of *res judicata* based on "the 1990 Indiana action," an action over which the Oklahoma court did not preside, and so forth. *See* Appendix 2-5.

Where, as here, the defendants rely on factual arguments to support affirmative defenses in their motions to dismiss, the district court is required, by the plain language of the rule, to treat those motions as motions for summary judgment. *See* Wright & Miller, at § 1366 ("There is considerable authority to the effect that the conversion provision applies to affirmative defenses raised on a Rule 12(b)(6) motion. As a result, when a defendant's motion to dismiss raises an affirmative defense that is not apparent on the face of the pleading and outside matter is presented and accepted, federal courts generally will treat the motion as if it were one for summary judgment."). For example, to support the affirmative defense of *res judicata*, it is necessary that the record of the prior case be received in evidence—and, if it is, the motion to dismiss must be converted to one for summary judgment. *See Guam Investment Company v. Central Building, Inc.*, 288 F.2d 19, 24 (9th Cir. 1961).

The decisions of the District Court and Tenth Circuit in this case are in direct conflict with decisions of other Circuits that reject attempts to inject factual matters outside the pleadings into the review of a motion to dismiss. *See, e.g., Kostrzewa v. City of Troy,* 247 F.3d 633, 643-44 (6th Cir. 2004) (reversing order granting Rule 12(b)(6) motion where it appeared that district court, in reaching its conclusion, may have relied upon defendants' assertion in their motion to dismiss that a plea bargain had been made); *Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir. 2001) (reversing dismissal of plaintiff's § 1983 claims where district court's decision "was rooted in defendants' factual assertions"); *Friedl v. City of New York*, 210 F.3d 79, 83 -84 (2d Cir. 2000)(holding that the district court errs in review of the 12(b)(6) motion to dismiss when it "relies on factual allegations contained in legal briefs or memoranda . . .").

It is no answer to say, as Defendants argued in the Court of Appeals below, that the District Court's decision was really one on summary judgment. If a motion to dismiss must be converted to a motion for summary judgment, the district court is required to give the

nonmovant notice of that conversion and an opportunity to present evidence in response to the motion. *See* Wright & Miller, at § 1366 (citing cases); *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989) (holding it is reversible error to convert a motion to dismiss to a motion for summary judgment without notice).[12]

These rules "safeguard a complainant from surprise." *Herron v. Herron*, 255 F.2d 589, 594 (5th Cir. 1958). Rules 12(b) and 56 are designed to prevent the "oddity" of a complainant being denied a "fair shake" at proving his case, without an opportunity to produce witnesses or conduct discovery. *Id.*

This Court should grant certiorari to clarify the proper Rule 12(b)(6) standard of review.

CONCLUSION

The petition for writ of certiorari should be granted.

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[12] The nonmovant on a motion for summary judgment should also be given an adequate opportunity for discovery. *See Robinson v. Terex Corp.*, 439 F.3d 465, 467 (8th Cir. 2006) ("Although discovery need not be complete before a case is dismissed, summary judgment is proper only if the nonmovant has had adequate time for discovery.").

Respectfully submitted,

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APPENDIX

1 Opinion issued by the United States Court of Appeals, Tenth Circuit (February 1, 2007)

2 Case No. 04-C-341-E, Order of January 24, 2006

3 Case No. 02-C-721-E, Order of January 24, 2006

4 Case No. 02-C-425-E, Order of March 6, 2003

5 Case No. 02-C-408-E, Oder of March 6, 2003

6 Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961

7 Federal Rule of Civil Procedure 12(b)